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Robin Green

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The Future of Entertainment in Cyber

Copyright in the Age Napster and Beyond

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The Future of Entertainment in Cyberspace

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State Bar
of California
Business Law
Section
Cyberspace
Law
Committee

Copyright in the Age of Napster and Beyond

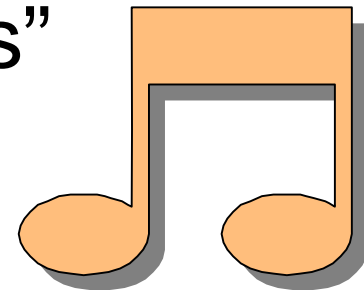
By: Beverly Robin Green, Green & Green

Copyright Survives Technology/Napster

- **U.S. Copyright Law, 17 U.S.C. § 101 et seq. has evolved over half Millennium:**
 - From English common law over 500 yrs. ago, w/the advent of then hi tech Gutenberg Press & the English Statute of Anne 300 yrs. ago to a Constitutional Right
 - Article 1, § 1 of the U.S. Constitution
 - Granted Congress the power to promote copyright in the “useful arts” by protecting for “limited times” the rights of “authors” in their “writings”...
 - Always balancing act of rights: (1st Amendment freedom of speech arguments, “Fair Use” factors defense, & protection of public from monopolies-antitrust defense issue raised in Napster case...

Recorded Music Not Protected

- 1st US Act-limited to “writings”
 - White Smith v. Apollo
28 S.Ct. 319 U.S. (1908)
- S.Ct. construed “writings” narrowly;
Held “Mechanically” made and readable
copies of music on then hi-tech piano
rolls were not “writings” as was sheet
music, and not entitled to © protection!
- Could have been death to fledgling US
music publishing industry, but Congress
came to rescue



1909 Copyright Act

- **Congress addressed this new technology in the 1909 Act & corrected this negative effect by:**
 - Extending language of © protection to so-called “Mechanical” copies,
 - **Creating so-called “Mechanical Rights” and “Mechanical Royalties” that are so important to the music publishing industry today**



Copyright Act of 1976

A “Bundle” of Rights

**Major © Law Revisions, eff. 1.1.78, still the Basic
“New” © Law; recent Laws amend this Law**

Copy “RIGHTS” include EXCLUSIVE rights to:

- 1) so-called “Reproduction Right”- Basic right to “Copy”, reproduce or make copies or phonorecords of a copyrighted work**
- 2) “Derivative Rights” – Broad rights to prepare derivative works based on the copyrighted work,**
- 3) “Distribution Rights” – To distribute, by sale, rental, lease, or lending, a copyrighted work,**
- 4) “Performance Rights” To publicly perform a copyrighted work (with great differences between the earlier & broader protection granted to musical works and the much more recent and limited protection granted to sound recordings), and**
- 5) Rights to publicly display a copyrighted work.**

Duality of Music Rights

**© Law Separate Categories of Copyrightable
“Works” incl. Music as a separate
Copyrightable Work from Sound Recordings**

**So called “Performance right” only
applied to underlying Musical work
(PA), & Not separate SR of music**

**Note: © owner of Music is Music
Publisher; © in SR usually Record Co.**

**Federal copyright protection for SR
only since amendment effective
*to SR fixed since Feb.15, 1972***

Work Made for Hire

- **Basis: 17 U.S.C. § 101**
 - Major Defense Issue raised in “Napster” as to whether Record Cos. (RIAA) can rightfully claim sound recordings as “work made for hire” or whether the recording artists have some claim to their work:
 - “Work for Hire” applies only if:
 - Artists are Employees of the Record Companies or
 - As Independent contractors, by written contract, BUT these works are not of the WMFH categories
 - RIAA lobbied in a 1999 “technical correction” amendment to include SR as a category of WMFH, but when caught, repealed retroactively in 2000, w/ specific provision “that neither the amendment nor its deletion can be given any legal significance.”
 - “Recording Artists Coalition” (RAC) filed a brief in Napster against the RIAA on these issues-RIAA must prove ownership
- **Other Artist v. Rec. Co. Issues incl. so-called “7-year rule” California Labor code §2855-Personal Services Contracts**
 - Subdiv. (a) Limits employment contract to 7 years, BUT Record Companies lobbied exceptions for Recording Obligations under Recording Contracts=Unfair to Artists.

Latest Copyright Laws Digital SR Perf. Rt.

– Digital Performance Right in Sound Recordings Act of 1995 (DPRA) P.L. 104-39; S.227

- **Expanded SR rights to Limited “Performance Right”, ONLY for certain DIGITAL PERFORMANCES, with**
- **Exceptions for Digital “Broadcasts” (similar to Radio BC) & Statutory License/Rates for certain Subscription Services not interactive or on-demand (digital only=NOT fully RECIPROCAL for payments under EU treaties).**

Digital Millennium Copyright Act 1998 (DMCA) 17 U.S.C. §512 et seq.

- To implement WIPO Treaties for RECIPROCITY of © protection, and
- To address other technology related © Issues, Incl.
 - Prohibit circumvention of technology measures to protect © (also Film Industry CSS issue)
 - Provide Online © Infringement Liability Limitations for online service providers under CERTAIN categories & conditions, and
 - To extend the Digital Performance Rights Act to incl. so-called “streaming audio” & “webcasting”
 - © Office Arbitration Panel rates – after hearings, came back higher than 3%-15% gross; Webcasters say \$.007-\$.014 per song (.07 cents to .14 cents per thousand listeners) too high for most, Librarian of Congress to decide May 21...now asking Congress to intervene...
 - Savings Clauses: Digital Millennium Act does Not effect “Fair Use” or Vicarious or Contributory Infr.

Also, “Sony Bono Copyright Extension Act”

- 1998 Act Incr. 1976 Act Term to Life + 70 years (conforms to Eu treaties/reciprocity)
- Latest of several extensions of term, since Congr. granted Const. power to protect © for “limited times”, from 14 yrs. to 28, 56, 75, to life + 50, (eff. 20 yrs., since 1978)
- Still limited time & © material can still be used under some circum. & conditions
- 1st A. Const. Chall. Argued for interests of Internet & “PD” users, rejected by US Court of Appls. D.C. Cir.; S.Ct. granted CERT. Eldred v. Ashcroft 01-618 [Feb, 02]

What the Evolving Case Stands For:

- Napster A & M Records, Inc. vs. Napster, Inc.
U.S.D.C. N Dist California, No. C 99-5183 MHP No. C 00-0074 MHP **1st court challenge by the majors-RIAA-major record cos. & music publishers v. rampant “free” Internet use of music**
- Evolving Napster case tests how the cobbled together Copyright Law applies to new challenges of technology & the internet
- **Napster had 40-60 million “free” users downloading music**
 - Not the 1st time, traditional Radio was “free”, too, BUT technology was such that radio was promotional; limited, & not interactive, on demand, or downloadable; not so easily or perfectly copied; or on massive scale; promoted music sales
- Traditional “Fair Use” factors will be considered as affirmative defense (even though they did Not apply to Napster’s use)
- Congr.- Napster lobbying for some kind of “compulsory” licensing on record companies for digital downloads, something like the compulsory licensing provisions of the Copyright Law (17 U.S.C. §115) that apply to mechanical licensing of **musical compositions**, to digital downloads of **sound recordings**
- © infringement still requires:
 - 1) proof of ownership of copyright &
 - 2) infringement of one or more exclusive bundle of rights in ©

Napster Not Like Pre-Internet Technology-Napster Not Betamax

- **Napster argued its service was capable of non-infringing, personal use of “time-shifting”, as allowed by the S.Ct. Sony v. Universal 104 S.Ct. 774, 464 U. S. 417 (1984).**
 - Under Sony, or the “Betamax” case, the copyright holder cannot extend his monopoly to products “capable of substantial noninfringing uses.”
 - But US No. Dist. Court Chief Judge Patel rejected the comparison & granted prelim. inj. ag. Napster noting:
 - **Napster’s control over the service (as opposed to a mere manufacturer) &**
 - **The “VAST SCALE” and “MASSIVE SCALE” of “illegal copying” and distribution by “millions of users” swapping unauthorized files they don’t own**

Napster Not like MP3 Player

- **Napster's argument as to stretching "time-shifting" to "space-shifting" as allowed for MP3 Players, also rejected**
 - **RIAA v. Diamond Multimedia Sys., Inc.**
1999 9th Cir. (U.S.C.A. 9th Cir. 1999) 180 F.3d 1072, involved an inapplicable statute (Audio Home Recording Act of 1992)
 - **MP3 Player case allowed space-shifting as a non-commercial personal use**

Napster Not Fair Use: 9th Cir. Reviews Fair Use Factors

- The U S Court of Appeals for the Ninth Circuit upheld Judge Patel's preliminary injunction ruling, and her fair use analysis:
- - “FAIR USE” factors listed in 17 U.S.C. § 107; factors only; guide court's fair use determination.
- **These 4 FAIR USE factors are:**
 - **(1) the purpose and character of the use;**
 - Downloading MP3 files is not transformative (not a parody as in Campbell v. Acuff-Rose Music (1994)).
 - Napster file hosting service is a commercial, large scale, anonymous use; not a non-commercial, personal use
 - **(2) the nature of the copyrighted work;**
 - Note: Music and SR are entitled to more protection than “fact-based” works, as closer to the core of intended © protection

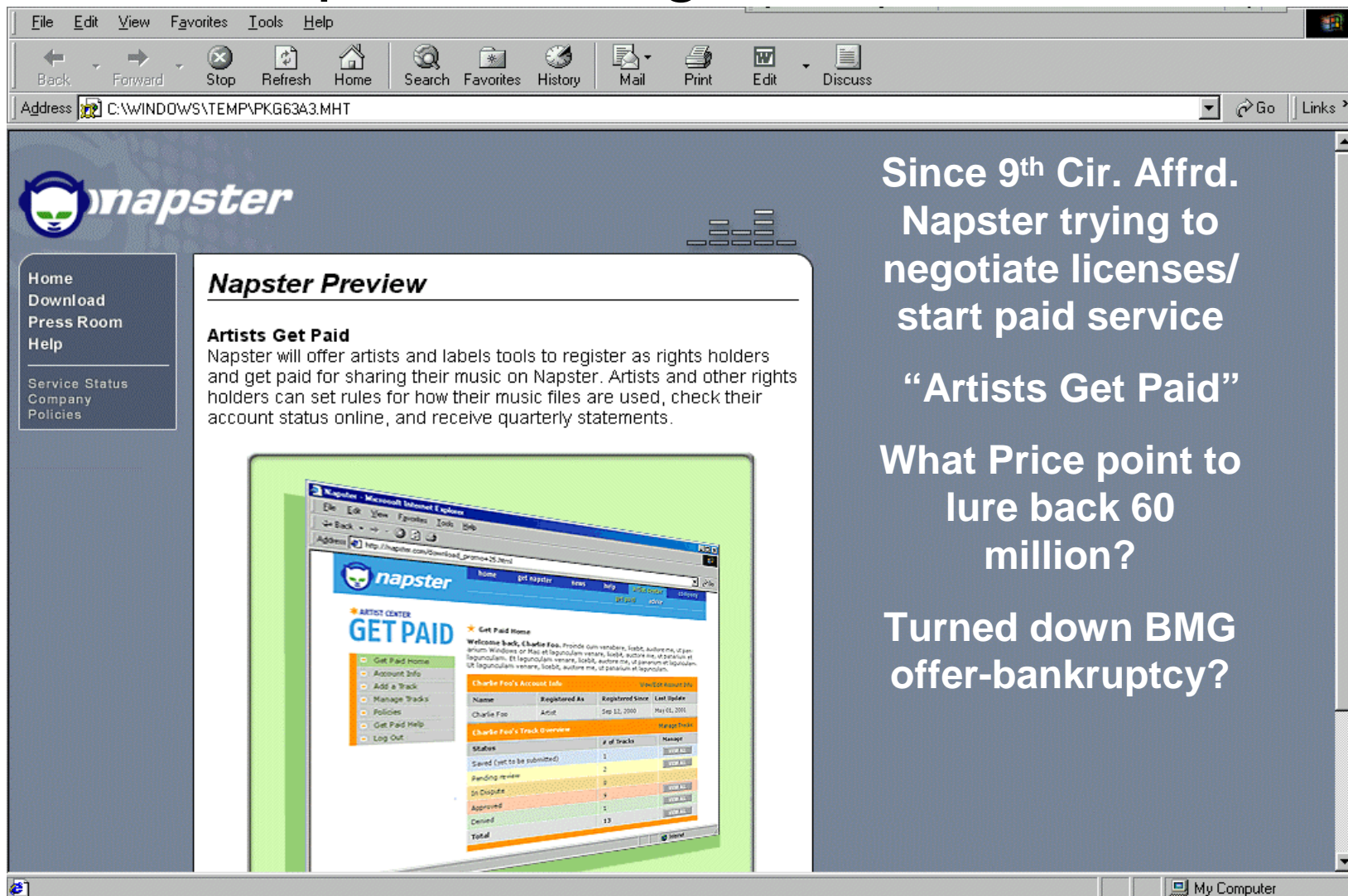
[1] 510 U.S. 569 (1994)

Napster Not Fair Use

- (3) the "amount and substantiality of the portion used" in relation to the work as a whole; and
 - Note that file transfers necessarily involve copying the entirety of the work (while entire copying WAS allowed as time-shifting in the Sony Betamax video player case)
- (4) the effect of the use upon the potential market for the work or the value of the work.
 - "The importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." Campbell, 591 n.21."
 - Rec. Cos. Argued undercutting own efforts to start digital music services; leading to new Anti-trust allegations

CONCLUSION: Between the massive, commercial use (Factor 1), the most protected status of the creative works to be protected (Factor 2), the entirety of the copying (Factor 3) and the alleged effect on the market (Factor 4) , the factors weight against "Fair Use" for Napster.

Napster Changes its Tune



Since 9th Cir. Affrd.
Napster trying to
negotiate licenses/
start paid service

“Artists Get Paid”

What Price point to
lure back 60
million?

Turned down BMG
offer-bankruptcy?

Music Subscriptions?

- Record Cos. own Digital Subscription Services
- Bring on Anti-Trust Claims, current issue in Napster
- MusicNet (AOL Time Warner, Bertelsmann BMG & EMI) & PressPlay (Sony & Vivendi Universal) are Losing \$\$\$
 - **Public is generally rejecting**
 - the idea of limited materials, & any **paid**, subscription online music services, and
 - still expecting everything on the net to be for “free”
 - Societal change, Education needed to overcome
 - » Better access, quality control may be “draws”

FileEditViewFavoritesToolsHelp

BackForwardStopRefreshHomeSearchFavoritesHistoryMailPrintEditDiscuss

Addresshttp://www.kazaa.com/en/index.htmGoLinks

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Welcome to the world of p2p
(peer-to-peer)

KaZaA Media Desktop (KMD) is the no.1 software for finding, downloading, playing and sharing files with millions of other users. Get the latest version of the KaZaA Media Desktop and find out why more than 65 million copies have been downloaded.

My RecommendationsKMD v1.6.1 Out Now

Audio (100)DocumentImageOthergreat new features

A powerful recommendation engine, an improved interface and an enhanced family filter make this the best KMD yet.

Read About ItDownload Now

who are they?About Sharman Networks

In February 2002, Kazaa.com and the Kazaa Media Desktop were purchased by Sharman Networks Ltd. Find out about the company, the people that work here and what we are doing to bring you better and better KaZaA Media Desktops.

Read About Us

new kazaa pledgeYour Privacy

c|netDOWNLOAD.COMDownload now!

Where Napster stopped, others rush to take its place

KaZaA:

Claims over 73 million downloads of this software.

Points out the tremendous potential market in “singles downloading”

Direct P2P music swapping using Kazaa software, Held by Dutch Court to NOT be Contributory © Infringement under Dutch law; BUT this should NOT affect Napster Case, under US © Law.

Welcome to the world of p2p (peer-to-peer)

KaZaA Media Desktop (KMD) is the no.1 software for finding, downloading, playing and sharing files with millions of other users. Get the latest version of the KaZaA Media Desktop and find out why more than 65 million copies have been downloaded.

My Recommendations

- Audio (100)
- Document
- Image
- Other
- great new features

KMD v1.6.1 Out Now

A powerful recommendation engine, an improved interface and an enhanced family filter make this the best KMD yet.

Read About It Download Now

who are they?

About Sharman Networks

In February 2002, Kazaa.com and the Kazaa Media Desktop were purchased by Sharman Networks Ltd. Find out about the company, the people that work here and what we are doing to bring you better and better KaZaA Media Desktops.

Read About Us

new kazaa pledge

Your Privacy

Where Napster stopped,
others rush to take its place
KaZaA:

Claims over **73 million**
downloads of this software.

Points out the tremendous
potential **market in “singles
downloading”**

Direct P2P music swapping
using Kazaa software, Held
by Dutch Court to NOT be
Contributory © Infringement
under Dutch law; BUT this
should NOT affect Napster
Case, under US © Law.

Foretelling Changes in the Entertainment Industry:

- **E-Book Publishing Cases** demonstrate that the courts are developing a consistent policy of protecting copyrights from the printed page to the digital compact disk or onto the internet.
 - **National Geographic** - ownership of the photographs and the scope of the license, and narrow application of the privilege (*not the right*) of 17 U.S.C. §201 (c)= NG on compact disc was not a mere “revision” of a collective work, but a new, derivative work, one of the exclusive bundle of rights of the © owner (17 U.S.C. § 106(2)).
 - **Tasini** US Supreme Court also ruled that re-publication of copyrighted works of freelance writers in an electronic *database*, when the articles were only licensed for use in print, also constituted copyright infringement, by creating a new work, (instead of just a revision of an existing collective work).
 - **Random House v. Rosetta Books** Rosetta contracted with authors to sell e-versions of books; Random House tried to enjoin, claiming contractual rights to publish all books, including digital books; Held: 2nd Cir. Affirmed denial of Preliminary Injunction; to trial.
- Note: Book Publishing Industry Practices as to © & Contracts, Very Different from Music Publishing and Music Recording Industry Business Practices & Contracts!

[1] Jerry Greenberg v. National Geographic Society, (U.S.C.A. 11th Cir March 22, 2001) No. 00-10510.

[2] New York Times Co., Inc. v. Tasini (June 25, 2001), 121 S.Ct. 2381 U.S. 483, 150 L.Ed.2d 500

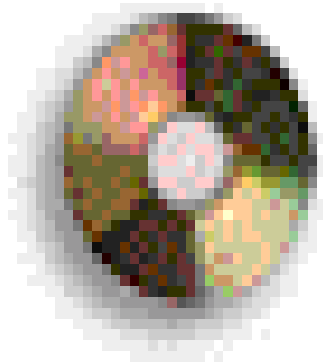
[3] Random House, Inc. v. Rosetta Books LLC (U.S.C.A. 2nd Cir. Mar. 8, 2002) 150 F. Supp. 2d 613

Music Recording Industry Leading the Way

- Sound recording industry, shrinking-international mergers- only 5 or so “major” record labels” (RIAA), grown as strong or stronger than the music publishing industry and is leading the way with new laws and business models:
 - **Anti-trust issues (own online monopoly?)**
 - **Copyright ownership issues (WMFH, k, statutes),**
 - **Fair use issues (as reviewed in Napster),**
 - **Digital Copy Protection issues (Uni/Eminem CD),**
 - **Internet, Napster and new, Intl. P2P (Kaaza) issues**
- Requires understanding & development of entertainment industry law/business models.

New and Newer e-Media

Challenges to Copyright Owners to Keep us with Licensing New Technology



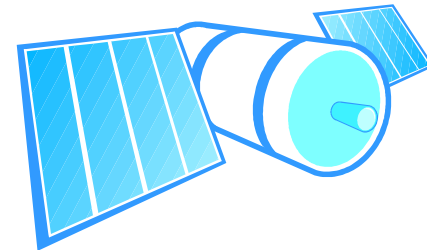
CD / DVD



Chip
Technology



Peer-to-Peer &
Subscription



Satellite

Thank You!

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[1] AV rated, Member, IP Section